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8 UNITED STATES DISTRICT COURT

9 NORTHERN DISTRICT OF CALIFORNIA

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11 LAURA FUJISAWA, et al.	)	No. C07-5642 BZ
12 Plaintiff(s),	)	Related Cases: C07-3431 BZ
13 v.	)	C08-4118 BZ
14 COMPASS VISION, INC., et	)	C09-2016 BZ
15 al.,	)	<b>ORDER GRANTING MAXIMUS'S</b>
16 Defendant(s).	)	<b>MOTION FOR SUMMARY JUDGMENT</b>
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18 Third-Party Defendant and Counterclaimant Maximus, Inc.  
19 ("Maximus") moves for summary judgment against Compass Vision,  
20 Inc. ("Compass") on its complaint for indemnity.<sup>1</sup> Maximus  
21 does not move for summary judgment on its counterclaim against  
22 Compass. For the following reasons, Maximus's motion is  
23 **GRANTED**.

24 Maximus and Compass entered into a Consulting Agreement  
25 ("the Contract") which required Compass to "assist with the  
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27 <sup>1</sup> All parties have consented to my jurisdiction,  
28 including entry of final judgment, pursuant to 28 U.S.C.  
§ 636(c) for all proceedings.

1 development, coordination, and provision of laboratory  
 2 services for Participants of the California Department of  
 3 Consumer Affairs Diversion Program," the program in which  
 4 plaintiff Dr. Fujisawa was a participant.<sup>2</sup> Doc. No. 226-1,  
 5 Swider Decl. Ex. 4. Maximus's sole obligation under the  
 6 Contract was to "pay Compass Vision" according to a fee  
 7 schedule. Under the indemnification provision of the  
 8 Contract, Maximus agreed to

9 defend, indemnify and hold Compass Vision harmless from  
 10 and against any and all claims, losses, liabilities or  
 11 expenses (including without limitation attorneys' fees)  
 12 which may arise, in whole or in part, out of (i) the  
 negligence or willful misconduct of Maximus, its  
 employees or agents, or (ii) a breach by Maximus of its  
 obligations under this agreement.

13 Id. § 13, P. 4.

14 Compass filed a third party complaint against Maximus for  
 15 (1) breach of contract, (2) contractual indemnity, (3)  
 16 equitable indemnity and contribution, and (4) declaratory  
 17 relief. Doc. No. 113. The only breach of which Compass  
 18 complains is Maximus's alleged failure to indemnify and defend  
 19 Compass in the underlying action. Essentially, all four  
 20 causes of action seek indemnity from Maximus for any damages  
 21 and attorney fees which Compass incurs defending plaintiff Dr.  
 22 Laura Fujisawa's complaint. Dr. Fujisawa did not sue Maximus  
 23 and makes no claims against it.

24 The parties agree that Compass is only seeking indemnity  
 25 for Dr. Fujisawa's claim, to the extent it arises from  
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27       <sup>2</sup> A full recitation of the facts underlining their  
 28 dispute appears in the Order denying Compass's motion for  
 summary judgment. See Doc. No. 184.

1 Maximus's negligence or willful misconduct. Opp. p. 12:8-9;  
2 Motion p. 9. By pointing to a lack of evidence, Maximus  
3 shifted the burden to Compass first to present evidence of  
4 negligent or willful misconduct by Maximus that resulted in  
5 harm to plaintiff for which she seeks to hold Compass  
6 responsible. Dr. Fujisawa alleges that her damages in this  
7 case stem from the wrongful promotion and use of ETG testing  
8 as a reliable method of detecting intentional alcohol  
9 consumption. Maximus can only be required to indemnify  
10 Compass for Dr. Fujisawa's damages if its negligence or  
11 willful misconduct contributed to her damages.

12 Several provisions of the Joint Stipulated Statement of  
13 Undisputed Material Facts resolve the issue of indemnity.

14 Doc. No. 212-1, "Joint Statement." Compass stipulated that  
15 in its administration of the Program, however, Maximus  
did not: promote the implementation of ETG testing in the  
16 Program, decide to implement ETG testing, decide the cut-  
off levels used to determine a positive ETG result,  
17 determine if a given ETG test result was a positive or a  
negative, or make decisions to terminate, discipline, or  
18 remove a participant from the Program.

19 Joint Statement, No. 9 (emphasis in original). The parties  
20 further agreed that the Board implemented ETG testing, that  
21 Compass promoted ETG testing, and that Maximus was a mere  
22 middleman responsible for gathering test results from Compass  
23 and transmitting them to the Board. Joint Statement Nos. 10,  
24 11, 41. To the extent the Joint Statement tracks the  
25 provisions of Dr. Fujisawa's complaint, Compass has agreed  
26 that Maximus played no role in the damages that Dr. Fujisawa  
27 is claiming. It is difficult to conceive how Compass can  
28 attribute any of Dr. Fujisawa's damages to Maximus's

1 negligence or willful misconduct given the undisputed facts.

2       Compass unsuccessfully attempts to defeat summary  
3 judgment by presenting evidence that Maximus failed to perform  
4 its obligations under its contract with the Board. Compass  
5 has not presented any evidence that anything Maximus did or  
6 did not do under its contract with the Board resulted in the  
7 harm for which Dr. Fujisawa is seeking relief. Compass  
8 presented evidence that Maximus failed to fulfill certain  
9 contractual obligations, such as appointing a Medical Advisor,  
10 but does not establish how that caused the problems with EtG  
11 testing for which Dr. Fujisawa seeks to hold Compass liable.  
12 Compass further states that "Maximus had the clinical  
13 responsibilities for the Program" but fails to explain how  
14 that creates a triable issue of fact, given the undisputed  
15 facts. Even if Maximus did hold such responsibilities and  
16 failed to discharge them, Compass has not established how that  
17 would obligate Maximus to indemnify Compass should Dr.  
18 Fujisawa establish the deficiencies in the EtG testing program  
19 she claims.

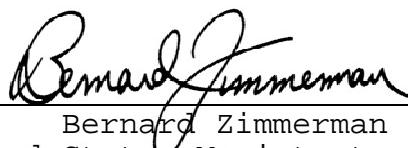
20       At oral argument, Compass reiterated the claim that  
21 Maximus's alleged failure to perform certain of its  
22 contractual obligations with the Board require Maximus to  
23 indemnify Compass. This argument misses the mark. Even if  
24 Maximus failed to appoint a Medical Review Officer or to  
25 discharge its clinical responsibilities, Dr. Fujisawa is not  
26 seeking damages for such conduct. None of plaintiff's claims  
27 against Compass arise from Maximus's conduct, and Compass is  
28 therefore not entitled to indemnity from plaintiff's claims.

1       The only evidence that Compass submitted was declarations  
2 replete with general testimony and legal conclusions. See  
3 e.g. Doc. No. 226-3, Brown decl. ¶ 6, 10, 14. The Brown  
4 declaration does not address Dr. Fujisawa's participation in  
5 the Program with any degree of specificity. It is unclear if  
6 Ms. Brown even offers an opinion on Dr. Fujisawa's case. For  
7 example, Ms. Brown states that if Maximus had provided certain  
8 resources, "it is likely that the Plaintiff would have  
9 successfully completed the program." Id. ¶ 8. Aside from  
10 being entirely speculative, the conclusion offered by Ms.  
11 Brown does not establish how the provision of additional  
12 resources by Maximus would have altered the discipline that  
13 the Board imposed on Dr. Fujisawa. The declaration is written  
14 almost entirely in generalities and does not create a triable  
15 issue of fact as to causation. The McKown declaration suffers  
16 from similar defects. Doc. No. 226-2. In that declaration,  
17 the President of Compass simply opines on the legal  
18 obligations and shortcomings of Maximus. The declaration does  
19 not address Dr. Fujisawa's case at all. Accordingly, the  
20 declaration is entitled to very little weight and does not  
21 create a triable issue of fact.

22       Compass cannot prove its entitlement to indemnity from  
23 Maximus as a matter of law. The undisputed facts establish  
24 that Maximus had no role in causing the harm of which Dr.  
25 Fujisawa's complains. **IT IS THEREFORE ORDERED** that Maximus's  
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1 motion for summary judgment on Compass's third-party complaint  
2 is **GRANTED**.

3 Dated: August 13, 2010

4   
5 Bernard Zimmerman  
6 United States Magistrate Judge

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